

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MICHAEL WHITFIELD,

Plaintiff,

v.

NEVADA STATE PERSONNEL, *et al.*,

Defendants.

Case No. 3:20-cv-00637-MMD-WGC

ORDER

**I. SUMMARY**

*Pro se* Plaintiff Michael Whitfield brings this action against Defendants for employment discrimination. (ECF No. 12.) Before the Court are two motions to dismiss, one filed by Defendants James Dzurenda, Nevada Department of Correction (“NDOC”), Nevada State Personnel Commission, Nevada Department of Administration, and Lorna Ward (collectively, “Original Defendants”) (ECF No. 13),<sup>1</sup> and one filed by Defendant Kevin Ranft (ECF No. 26).<sup>2</sup> Defendants move to dismiss, in part, for insufficient service of process under Federal Rule of Civil Procedure 12(b)(5).<sup>3</sup> Also before the Court is Whitfield’s motion to extend time of service (second request) (ECF No. 39), Original Defendants’ motion for leave to file supplemental legal authority (ECF No. 29), and Whitfield’s motion for leave to file supplemental legal authority (ECF No. 31). Because

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<sup>1</sup>Whitfield also added former Governor Brian Sandoval, Travis Roberts, Lisa Walsh, and Perry Russell as Defendants in the amended complaint. (ECF No. 12.) Original Defendants’ motion to dismiss similarly seeks dismissal of these additional Defendants for failure to timely effectuate service of process. The Court grants the request because no proof of service has been filed relating to these additional Defendants.

<sup>2</sup>Defendant Kevin Ranft is a labor representative for the American Federation of State, County, and Municipal Employees, Local 4041. (ECF No. 26 at 1, 3.) He is not employed by the State of Nevada. (*Id.*)

<sup>3</sup>Whitfield filed responses to the motions to dismiss (ECF Nos. 16, 38), and Original Defendants and Ranft filed replies (ECF Nos. 19, 41).

1 the Court finds that service was insufficient and Whitfield failed to demonstrate good  
2 cause or excusable neglect, and as further explained below, the Court will grant the  
3 motions to dismiss, deny Whitfield's motion for extension of time, and deny the other  
4 pending motions as moot.

## 5 **II. BACKGROUND**

6 The following allegations are adapted from the first amended complaint ("FAC")  
7 unless otherwise noted. (ECF No. 12.)

8 Whitfield sued Defendants for employment discrimination on the basis of race. (*Id.*  
9 at 15-18.) In August 2017, Whitfield's former partner obtained a three-year order of  
10 protection against him in California. (ECF Nos. 12 at 3-4, 16 at 2.) The order of protection  
11 prohibited Whitfield, who was an NDOC correctional officer at the time, from carrying a  
12 firearm, which was a condition of his employment. (ECF No. 12 at 5, 8.) Whitfield alleges  
13 that he was denied leave without pay, refused retraining for another position, and  
14 wrongfully terminated on April 18, 2018. (*Id.* at 5-8.) Original Defendants contend that  
15 Whitfield was terminated because he was unable to "resolve the restraining order and  
16 complete his biannual firearm qualification requirements" for his position. (ECF No. 13 at  
17 4.)

18 On November 13, 2020, Whitfield filed the initial complaint against Original  
19 Defendants, with proof of service due on February 11, 2021. (ECF No. 1.) On March 2,  
20 2021, the Court issued a notice of intent of dismiss under Fed. R. Civ. P. 4(m) because  
21 Whitfield failed to file proof of service for Original Defendants and set the dismissal  
22 deadline for April 1, 2021. (ECF No. 5.) Whitfield filed a declaration of service for the  
23 Original Defendants on March 29, 2021.<sup>4</sup> (ECF No. 6.) On April 9, 2021, Original  
24 Defendants filed a motion to dismiss for, in part, insufficient service of process under Rule  
25 12(b)(5). (ECF Nos. 7 at 16-18.) The Court granted Whitfield leave to amend his complaint  
26 and denied the motion to dismiss as moot. (ECF No. 11.)

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28 <sup>4</sup>To date, Whitfield has not formally filed any other declaration of service. However,  
he has provided some additional declarations as exhibits in his second motion to extend  
time for service. (ECF No. 39.)

On May 20, 2021, Whitfield filed the FAC, with service due on August 18, 2021, and added former Governor Sandoval, Warden Perry Russell, Assistant Warden Lisa Walsh, Lieutenant Travis Roberts, and labor representative Kevin Ranft as Defendants. (ECF No. 12.) Original Defendants filed a nearly identical motion to dismiss for, in part, insufficient service under Rule 12(b)(5). (EF No. 13 at 17.) Whitfield filed a motion to extend time of service on July 1, 2021, which United States Magistrate Judge William G. Cobb denied because Whitfield failed to show good cause or excusable neglect for untimely and improper service.<sup>5</sup> (ECF Nos. 21, 25.) On August 26, 2021, Defendant Kevin Ranft filed a motion to dismiss due, in part, to insufficient service.<sup>6</sup> (ECF No. 26 at 7.) On October 12, 2021, Whitfield filed a second motion to extend time for service, which is pending before the Court. (ECF No. 39.)

### III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(5) permits Defendants to move to dismiss for insufficient service of process. Moreover, Rule 4(m) permits a court to dismiss a case without prejudice “[i]f a defendant is not served within 90 days after the complaint is filed,” unless “the plaintiff shows good cause for the failure.” See Fed. R. Civ. P. 4(m). When service is challenged, the plaintiff bears the burden of establishing the validity of service under Rule 4. See *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). A federal court lacks personal jurisdiction over a defendant if service of process is insufficient. See *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

Although Rule 4 is flexible and “should be liberally construed so long as a party receives sufficient notice of the complaint,” “[n]either actual notice, nor simply naming the person in the caption of the complaint, will subject defendants to personal jurisdiction if service was not made in substantial compliance with Rule 4.” *Crowley v. Bannister*, 734 F.3d 967, 975 (9th Cir. 2013); *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)

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<sup>5</sup>Whitfield also filed a motion for service by publication, which Judge Cobb similarly denied. (ECF Nos. 32, 37.)

<sup>6</sup>Original Defendants and Ranft also argued for dismissal for failure to state a claim upon which relief may be granted under FRCP 12(b)(6). (ECF Nos. 13 at 2, 26 at 1.)

(citations omitted). Moreover, “sufficiency of service can be a fact-driven inquiry.” *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006). If the plaintiff has failed to substantially comply with Rule 4(m), there are “two avenues for relief” instead of dismissal. *Lemoge v. U.S.*, 587 F.3d 1188, 1198 (9th Cir. 2009). First, “the district court must extend time for service upon a showing of good cause.” *Id.* Second, if there is no good cause, “the district court may extend time for service upon a showing of excusable neglect.” *Id.*

#### IV. DISCUSSION

The deadline to serve the Original Defendants was February 11, 2021, and the deadline to serve the new Defendants named in the FAC was August 18, 2021.<sup>7</sup> Both deadlines have since expired. The Court now focuses its inquiry on whether Whitfield substantially complied with Rule 4 and Nevada service rules by the deadlines. Because Whitfield failed to substantially comply with the service rules, the Court next considers whether Whitfield demonstrated good cause or excusable neglect for the insufficient service. As Whitfield has failed to so show, the Court will grant Defendants’ motions to dismiss.

##### A. Substantial Compliance with Service Rules

The Court first addresses whether Whitfield substantially complied with Federal Rule of Civil Procedure (“FRCP”) 4 and Nevada Rule of Civil Procedure (“NRCP”) 4.2 for Defendants that are state agencies, then for current and former state officers, and finally for labor representative Ranft, since he filed a separation motion to dismiss.

##### 1. State Agencies

Whitfield failed to substantially comply with the federal and state service rules for the state agencies. Original Defendants argue that service of process was insufficient

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<sup>7</sup>The filing of an amended complaint does not restart the 90-day service period imposed by Rule 4(m), except “as to those defendants newly added in the amended complaint.” *Bolden v. City of Topeka*, 441 F.3d 1129, 1148 (10th Cir. 2006). The deadline for service of Defendants named in the original complaint was February 11, 2021. (ECF No. 1.) However, the Court, on its own, granted Whitfield an extension and gave him a deadline of April 1, 2021, to file proof of service for the Original Defendants. (ECF No. 5.)

1 because Whitfield served unauthorized employees or failed to serve the requisite entities  
2 and individuals under FRCP 4 and NRCP 4.2. (ECF No. 13 at 18-20.) Whitfield counters  
3 that service was sufficient because he served the Attorney General's Office and alleges  
4 that service on unauthorized agents had been acceptable in the past. (ECF Nos. 16 at  
5 16-17, 39 at 2.) The Court agrees with Original Defendants.

6 FRCP 4(j)(2) provides that a state government must be served by "(A) delivering a  
7 copy of the summons and of the complaint to its chief executive officer; or (B) serving a  
8 copy of each in the manner prescribed by that state's law for serving a summons or like  
9 process on such a defendant." Under NRCP 4.2(d)(1), the plaintiff must serve the state  
10 and its public entities by "delivering a copy of the summons and complaint to: (A) the  
11 Attorney General, or a person designated by the Attorney General to receive service of  
12 process, at the Office of the Attorney General in Carson City; and (B) the person serving  
13 in the office of administrative head of the named public entity, or an agent designated by  
14 the administrative head to receive service of process."

15 For the Nevada State Personnel Commission ("Commission"), Whitfield filed a  
16 declaration of service showing that a copy of the original complaint was left with Karen  
17 Rutledge at the AG's Office on March 19, 2021. (ECF No. 6 at 1.) The Court finds that  
18 service was insufficient for the following reasons. First, Whitfield failed to serve a copy of  
19 the summons on the AG or the Commission,<sup>8</sup> as required by FRCP 4(j)(2)(A) and NRCP  
20 4.2(d)(1). See *Omni Capital Int'l*, 484 U.S. at 104 (noting that "[b]efore a federal court may  
21 exercise personal jurisdiction over a defendant, the procedural requirement of service of  
22 summons must be satisfied"). Second, Whitfield did not serve the chief executive officer,  
23 administrative head of the Commission, or an agent designated by the administrative  
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25 <sup>8</sup>In their motion to dismiss, Original Defendants initially assert that Whitfield  
26 delivered a copy of both the summons and complaint. (ECF No. 13 at 18-19.) However,  
27 they later corrected this statement in their response to Whitfield's motion to extend service  
28 and stated that "none of the declarations of service provided by [Whitfield] show that a  
summons was also served with a copy of the complaint or amended complaint." (ECF No.  
40 at 4.) Since Whitfield's declarations only show delivery of the complaint or FAC, the  
Court construes Original Defendants' initial statement as an error.

1 head to receive service, as required by FRCP 4(j)(2)(A) and NRCP 4.2(d)(1)(B). (ECF  
2 No. 13 at 18.) Finally, Whitfield failed to provide any proof that he served a copy of the  
3 FAC, as required by Local Rule 15-1(b). See LR 15-1(b) (stating that “[i]f the court grants  
4 leave to file an amended pleading, and unless the court orders otherwise, the moving  
5 party must then file and serve the amended pleading”). Thus, Whitfield did not  
6 substantially comply with state and federal service rules for the Commission.

7 For the Nevada Department of Administration (“Department”), Whitfield filed a  
8 declaration of service showing that a copy of the original complaint was left with Process  
9 Specialist Brandy on March 19, 2021. (ECF No. 6-1 at 1.) Whitfield also provided a  
10 declaration<sup>9</sup> showing that a copy of the FAC was left with Sandie Guyer at the AG’s Office  
11 on May 28, 2021. (ECF No. 39 at 8.) The Court finds that service was insufficient for the  
12 following reasons. First, the declarations do not show that the AG and Department were  
13 served with the summons. (ECF Nos. 6-1 at 1, 39 at 8.) See FRCP 4(j)(2); NRCP  
14 4.2(d)(1). Second, for the original complaint, Whitfield never served the AG’s Office, and  
15 it is unclear whether Brandy was authorized by the Department’s administrative head to  
16 receive service. (ECF Nos. 6-1 at 1, 13 at 18-19.) See NRCP 4.2(d)(1). Since the filing of  
17 an amended complaint does not toll or restart the 90-day service deadline under Rule  
18 4(m), the Court finds that Whitfield failed to properly serve the Department by the April 1,  
19 2021, deadline. See *Bolden*, 441 F.3d at 1148.

20 Even if the Court were to consider Whitfield’s declaration of service for the FAC, it  
21 finds that service was also insufficient. First, Whitfield failed to provide a declaration that  
22 the Department’s administrative head or chief executive officer was served. See FRCP  
23 4(j)(2)(A); NRCP 4.2(d)(1)(B). Second, it is unclear whether Sandie Guyer at the AG’s  
24 Office was authorized by the Department’s administrative head to accept service, or if  
25 she was only a designated agent of the AG. (ECF Nos. 39 at 8, 40 at 4.) See NRCP  
26 4.2(d)(1)(B).

27 \_\_\_\_\_  
28 <sup>9</sup>Whitfield failed to separately file the declarations of service for the FAC with the  
Court, and instead attached them as exhibits in his second motion for extension of  
service. (ECF No. 39 at 7-9.)

1 For the NDOC, Whitfield filed a declaration of service showing that a copy of the  
 2 original complaint was left with Administrative Assistant Joel Hightower on March 19,  
 3 2021. (ECF No. 6-2 at 1.) Whitfield also provided a declaration showing that a copy of the  
 4 FAC was left with Katie Collins at the AG's Office on June 1, 2021. (ECF No. 39 at 7.)  
 5 This service, too, was insufficient for the following reasons. First, the record does not  
 6 show that the NDOC or AG was served with the summons. (ECF Nos. 6-2 at 1, 39 at 7.)  
 7 See FRCP 4(j)(2); NRCP 4.2(d)(1). Second, as to the original complaint, Whitfield did not  
 8 serve the AG's Office, and according to Original Defendants, Joel Hightower is a  
 9 correctional officer, not an administrative assistant, and he is not authorized to accept  
 10 service on the NDOC's behalf. (ECF No. 13 at 19.) See NRCP 4.2(d)(1). Whitfield  
 11 therefore failed to properly serve the NDOC by the April 1, 2021, deadline. See *Bolden*,  
 12 441 F.3d at 1148.

13 Even if the Court were to consider Whitfield's second declaration for the FAC, it  
 14 finds that service was insufficient as well. First, Whitfield fails to provide a declaration that  
 15 the NDOC's administrative head or chief executive officer was served. See FRCP  
 16 4(j)(2)(A); NRCP 4.2(d)(1)(B). Next, it is unclear whether Katie Collins at the AG's Office  
 17 was authorized by the NDOC administrative head to accept service, or if she was only a  
 18 designated agent of the AG. (ECF Nos. 39 at 7, 40 at 4.) See NRCP 4.2(d)(1)(B).

19 Accordingly, Whitfield's service of the Commission, Department, and NDOC did  
 20 not substantially comply with federal or state service rules.

## 21 2. State Officials

22 Similarly, Whitfield's service of the individual State Defendants also failed to  
 23 substantially comply with federal and state service rules. The Court first addresses  
 24 compliance of service for the Original State Defendants, and then addresses service for  
 25 the new State Defendants, who were added to the FAC.

26 Under FRCP 4(e), an individual must be served pursuant to the state law "where  
 27 the district court is located or where service is made" or by "delivering a copy of the  
 28 summons and of the complaint to the individual personally[.]" "leaving a copy of each at



1 the individual's dwelling or usual place of abode with someone of suitable age and  
 2 discretion who resides there[,]" or "delivering a copy of each to an agent authorized by  
 3 appointment or by law to receive service of process." NRCP 4.2(d)(2) requires a current  
 4 or former state officer who is sued in their official or individual capacity "for an act or  
 5 omission relating to his or her public duties or employment" to be served by "delivering a  
 6 copy of the summons and complaint to: (A) the Attorney General, or a person designated  
 7 by the Attorney General to receive service of process, at the Office of the Attorney  
 8 General in Carson City; and (B) the current or former public officer or employee, or an  
 9 agent designated by him or her to receive service of process."

10 For Ward, Whitfield filed a declaration showing that a copy of the original complaint  
 11 was left with Process Specialist Brandy on March 19, 2021. (ECF No. 6-1 at 1.) Whitfield  
 12 also provided a declaration showing that a copy of the FAC was left with Sandie Guyer at  
 13 the AG's Office on May 28, 2021. (ECF No. 39 at 8.) The Court finds that service was  
 14 insufficient for the following reasons. First, Whitfield failed to show that Ward or the AG  
 15 was served with the summons. See FRCP 4(e); NRCP 4.2(d)(2). Second, for the original  
 16 complaint, Whitfield failed to show that Ward was personally served or that Brandy was  
 17 authorized to accept service on her behalf. (ECF No. 13 at 19.) See FRCP 4(e)(2); NRCP  
 18 4.2(d)(2)(B). Moreover, Whitfield never served the AG with the original complaint, which  
 19 is required under Nevada rules. (*Id.*) See NRCP 4.2(d)(2)(A). Whitfield therefore did not  
 20 sufficiently serve Ward by the April 1, 2021, deadline. See *Bolden*, 441 F.3d at 1148.

21 Even if the Court were to consider Whitfield's second declaration for the FAC, it  
 22 finds that service was also insufficient. First, Whitfield failed to show that Ward was  
 23 personally served with the FAC. (ECF No. 40 at 4.) See FRCP 4(e)(2); NRCP 4.2(d)(2)(B).  
 24 Second, it is unclear whether Sandie Guyer at the AG's Office was specifically authorized  
 25 by Ward to accept service on her behalf, or if Guyer was only a designated agent of the  
 26 AG. (ECF No. 39 at 8.) See FRCP 4(e)(2)(C); NRCP 4.2(d)(2)(B).

27 For Dzurenda, Whitfield filed a declaration showing that a copy of the original  
 28 complaint was left with Administrative Assistant Joel Hightower on March 19, 2021. (ECF



1 No. 6-2 at 1.) Whitfield also provided another declaration showing that a copy of the FAC  
2 was left with Katie Collins of the AG's Office on June 1, 2021. (ECF No. 39 at 7.) The  
3 Court finds that service was insufficient for the following reasons. First, the declarations  
4 do not indicate that Dzurenda or the AG was served with the summons. See FRCP 4(e);  
5 NRCP 4.2(d)(2). Second, as to the original complaint, Whitfield fails to show that  
6 Dzurenda was personally served, and according to Original Defendants, Hightower was  
7 not authorized to accept service on Dzurenda's behalf. (ECF No. 13 at 19.) See FRCP  
8 4(e)(2); NRCP 4.2(d)(2)(B). Whitfield also never served the AG with the original complaint  
9 for Dzurenda, as required by NRCP 4.2(d)(2)(A). Hence, Whitfield did not properly serve  
10 Dzurenda by the April 1, 2021, deadline. See *Bolden*, 441 F.3d at 1148.

11 Even if the Court were to consider Whitfield's second declaration for the FAC, it  
12 finds that service was insufficient as well. First, Whitfield failed to show that Dzurenda  
13 was personally served with the FAC. (ECF No. 40 at 4.) See FRCP 4(e)(2); NRCP  
14 4.2(d)(2)(B). Next, it is unclear whether Katie Collins of the AG's Office was specifically  
15 authorized by Dzurenda to accept service on his behalf, or if she was merely the  
16 designated agent of the AG, who is representing Dzurenda in this lawsuit. (ECF No. 39  
17 at 7.) See FRCP 4(e)(2)(C); NRCP 4.2(d)(2)(B).

18 Finally, Original Defendants argue that Whitfield has not tried to serve Defendants  
19 Sandoval, Russell, Walsh, and Roberts, who were added to the FAC, at all. (ECF Nos.  
20 13 at 3, 40 at 4.) To date, Whitfield has not filed proof of service for any of these  
21 Defendants, and it is unclear whether he even attempted to serve them at all. Whitfield  
22 provided an activity report from the messenger service he used, which he said showed  
23 "his efforts to serve the defendants by the Reno Messenger Service." (ECF No. 39 at 2.)  
24 The report appears to contain a list with addresses for Sandoval, Russell, Walsh, and  
25 Roberts. (*Id.* at 15.) However, it is unclear from the report itself whether service was  
26 actually attempted at those addresses, and Whitfield fails to provide further explanation  
27 or clarification about the report in his motion. (*Id.* at 2, 15.) He also does not assert that  
28 he actually completed service for these new State Defendants. (*Id.* at 2-3.) Having

1 reviewed the record, the Court finds that Whitfield failed to serve Defendants Sandoval,  
2 Russell, Walsh, and Roberts by the August 18, 2021, deadline.<sup>10</sup>

3 The Court is not persuaded by Whitfield's arguments that service was sufficient  
4 because the AG had been served, and service on unauthorized employees was  
5 permissible in the past. (ECF Nos. 16 at 16-17, 39 at 2.) As explained above, simply  
6 serving the AG for some Defendants or serving an unauthorized employee is insufficient  
7 and does not substantially comply with federal and state service rules. *See Jackson*, 682  
8 F.2d at 1347 (noting that "[n]either actual notice, nor simply naming the person in the  
9 caption of the complaint, will subject defendants to personal jurisdiction if service was not  
10 made in substantial compliance with Rule 4").

### 11 **3. Kevin Ranft**

12 Because Defendant Ranft was not served with a summons, the Court will grant his  
13 motion to dismiss. *See Omni Capital Int'l*, 484 U.S. at 104. Ranft acknowledges, and  
14 Whitfield's declaration shows, that Ranft was personally served with the FAC on May 27,  
15 2021—before the August 18, 2021, deadline. (ECF Nos. 26 at 2, 26-1 at 2, 39 at 9.)  
16 However, the record supports that Ranft was not served with a summons, as is required  
17 by FRCP 4(e)(2) and NRCP 4.2(a). (ECF No. 39 at 9.) Whitfield therefore failed to  
18 substantially comply with federal and state service rules for Ranft.

19 Alternatively, Ranft argues that dismissal is appropriate under Rule 12(b)(6)  
20 because Whitfield's amended complaint "fails to state any claims against [him] that  
21 present cognizable legal theories." (ECF No. 26 at 4.) In the FAC, Whitfield's only  
22 allegations against Ranft were that he "was ineffective as union counsel because of  
23 inaction and ignorance" and "should have advised [Whitfield] of his inexperience before  
24 becoming [Whitfield's] representative." (ECF No. 12 at 11.) Whitfield does not provide any  
25 additional facts or details in the FAC to support these allegations. (*Id.*) He also does not  
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27 <sup>10</sup>In denying the motion for extension of time to serve Original Defendants on  
28 August 4, 2021, Judge Cobb pointed out the approaching deadline for service of process  
on the additional Defendants—August 18, 2021—and that Whitfield had not moved to  
extend that deadline. (ECF No. 25 at 4.)

1 specify which of the six causes of action in the FAC are against Ranft. (ECF Nos. 12 at  
 2 14-19, 26 at 2.) Even as liberally construed, in light of Whitfield's *pro se* status, the vague  
 3 and conclusory statements in the FAC against Ranft do not rise "above the speculative"  
 4 or contain sufficient factual matter to "state a claim to relief that is plausible on its face."  
 5 *Bell Atlanta Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662,  
 6 678 (2009). Hence, even if service on Ranft substantially complied with state and federal  
 7 rules, the Court finds that dismissal of Ranft is still proper under FRCP 12(b)(6).

### 8 **B. Good Cause or Excusable Neglect**

9 Because Whitfield did not substantially comply with FRCP 4 and NRCP 4.2, the  
 10 Court will evaluate whether Whitfield has demonstrated good cause to warrant an  
 11 extension of service time. See *Lemoge*, 587 F.3d at 1198. The Ninth Circuit has held that  
 12 "[a]t a minimum, good cause means excusable neglect." *Boudette v. Barnette*, 923 F.2d  
 13 754, 756 (9th Cir. 1991) (quotations omitted). See also *Lemoge*, 587 F.3d at 1198 n.3  
 14 (noting that "[g]ood cause to avoid dismissal may be demonstrated by establishing, at  
 15 minimum, excusable neglect"). However, "[i]n addition to excusable neglect, a plaintiff  
 16 may be required to show the following factors to bring the excuse to the level of good  
 17 cause: (a) the party to be served personally received actual notice of the lawsuit; (b) the  
 18 defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his  
 19 complaint were dismissed." *Lemoge*, 587 F.3d at 1198 n.3 (quotation omitted). As  
 20 explained below, because Whitfield has not made the threshold showing of excusable  
 21 neglect, the Court will not engage in this analysis.

22 When evaluating whether neglect is excusable, the Court must consider at least  
 23 four factors "(1) the danger of prejudice to the opposing party; (2) the length of the delay  
 24 and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether  
 25 the movant acted in good faith." *Id.* at 1192 (citations omitted).

26 While the record does not suggest that Whitfield acted with anything less than good  
 27 faith, the other three factors weigh against a finding of excusable neglect. For the first  
 28 factor, the Court finds that prejudice to Defendants is significant. The issue of service has

1 been ongoing since November 2020. With the passage of time, memories will likely fade,  
2 evidence may become stale, and witnesses may be harder to locate. *See Lovelady v. Las*  
3 *Vegas Metro. Police Dep't*, 649 F. App'x 358, 359 (9th Cir. 2016) (noting that  
4 "[u]nnecessary delay inherently increases the risk that witnesses' memories will fade and  
5 evidence will become stale") (citation and quotation omitted). Moreover, it is dubious  
6 whether all Defendants have actual notice of the lawsuit since, as explained above,  
7 service was either insufficient or non-existent. Thus, Defendants cannot properly defend  
8 themselves against Whitfield's allegations.

9 As to the second factor, the length of delay here has been substantial. Whitfield  
10 filed his initial complaint on November 13, 2020, and his FAC on May 20, 2021; service  
11 was due for the Original Defendants on February 11, 2021, and for the new Defendants  
12 on August 18, 2021. (ECF Nos. 1, 12.) To date, more than a year after Whitfield initiated  
13 the action, no Defendants have been properly served, if served at all. The significant delay  
14 not only hinders the progress of litigation, but also strains the Court's finite resources.

15 As to the third factor, the Court finds that Whitfield's reasons for the delay are  
16 unpersuasive. To start, Whitfield maintains that the process server did not know who  
17 could accept service and it was the receptionist's job to contact the appropriate personnel  
18 for service.<sup>11</sup> (ECF Nos. 16 at 16, 39 at 2.) The Court finds the arguments unpersuasive  
19 for the following reasons. First, it is Whitfield's responsibility, not Defendants', to ensure  
20 that the summons, issued by the Clerk, and the complaint are properly and timely served  
21 on Defendants. The federal and state service rules clearly state it is Whitfield's  
22 responsibility to "furnish the necessary copies to the person who makes service." FRCP  
23 4(c)(1); *see also* NRCP 4(b).

24  
25  
26 <sup>11</sup>Whitfield also alleges that the process server tried to serve "the Chief Executive  
27 Officer" but was directed to the AG's Office. (ECF No. 16 at 16.) This argument fails  
28 because Whitfield does not provide any additional details or affidavits regarding when  
those service attempts were made, the addresses used, the names of the individuals who  
referred the process server to the AG's office, and the names of the chief executive  
officers he tried to serve. (*Id.*)

1 Whitfield's argument that he and the process server did not know who could accept  
2 service is likewise unconvincing. See *Bonner v. Leon*, Case No. 2:13-cv-01858-APG-  
3 VCF, 2013 WL 6693649, at \*2 (D. Nev. Dec. 17, 2013) (stating that good cause is "more  
4 than simple inadvertence, mistake of counsel, or ignorance of the rules"). In April 2021,  
5 Original Defendants provided Whitfield with clear and specific instructions on how to  
6 properly effectuate service and who he needed to serve in their first motion to dismiss.  
7 (ECF No. 7 at 16-18.) Original Defendants clearly outlined this information again in their  
8 second motion to dismiss, filed in June 2021. (ECF No. 13 at 17-20.) Moreover, Judge  
9 Cobb's order denying Whitfield's first motion for extension of service also provided him  
10 with a clear roadmap for service. (ECF No. 25 at 4-5.) Original Defendants and Judge  
11 Cobb further highlighted the apparent deficiencies in Whitfield's prior service attempts.  
12 (ECF Nos. 7 at 16-18, 13 at 17-20, 25 at 5-6.) Thus, Whitfield was properly informed of  
13 the appropriate service procedures on multiple occasions.

14 Despite prior warnings, including a notice of intent to dismiss from the Court in  
15 March 2021, Whitfield waited until July 1, 2021 (almost five months past the February 11,  
16 2021, deadline) to file his first motion for extension of service for the Original Defendants,  
17 and until October 12, 2021 (almost two months after the August 18, 2021, deadline) to  
18 file his second motion for extension. (ECF Nos. 5, 21, 39.) To date, *more than a year* after  
19 he initiated this lawsuit in November 2020, Whitfield has failed to cure the deficiencies in  
20 service and has not filed *any* proof or declarations of service for at least four Defendants.  
21 See *Colen v. U.S.*, 368 F. App'x 837, 838 (9th Cir. 2010) (finding that the lower court "did  
22 not abuse its discretion by dismissing the action, without prejudice[,], after warning [*pro se*  
23 plaintiff] to comply with Federal Rule of Civil Procedure 4(m) and timely serve defendants,  
24 providing him an opportunity to demonstrate good cause when he failed to do so, and  
25 properly weighing the pertinent factors for dismissal").

26 Next, Whitfield argues that he had difficulty locating the addresses of current and  
27 former state officers, who retired or left their positions. (ECF No. 39 at 2.) While the Court  
28 is not unsympathetic to Whitfield's situation, the Court remains unpersuaded by

1 Whitfield's reasoning. First, Whitfield has not filed any affidavits or declarations of service  
2 for Defendants Sandoval, Walsh, Russell, and Roberts, and has failed to provide the  
3 Court with the specific steps he took, if any at all, to serve these individuals. (ECF Nos.  
4 13 at 3, 40 at 4.) Second, Original Defendants previously notified Whitfield of the possible  
5 whereabouts of some Defendants. For instance, in their motion to dismiss, Original  
6 Defendants revealed that Dzurenda no longer worked for the NDOC and lived in New  
7 York. (ECF No. 13 at 19.) They even disclosed that Dzurenda was the current Sheriff of  
8 Nassau County in New York. (ECF No. 34 at 7.) To date, Whitfield has not presented any  
9 documentation that he attempted to personally serve Dzurenda in New York. Original  
10 Defendants also disclosed that Sandoval was the current President of the University of  
11 Nevada. (*Id.*) To date, Whitfield has failed to provide any declarations or proof of service  
12 for Sandoval. Thus, Whitfield failed to show that he was diligent in attempting to locate  
13 and serve Defendants—and his neglect is therefore not “excusable.” See *Bonner*, 2013  
14 WL 6693649, at \*2 (noting that good cause is generally “equated with diligence”).

15 Finally, Whitfield argues that Defendants have “made it difficult for [him] to achieve  
16 affective service” and suggests defense counsel may be hindering service. (ECF Nos. 38  
17 at 4, 39 at 3.) The record does not support that Defendants are intentionally impeding  
18 Whitfield from effectuating service. In fact, as explained above, Original Defendants have  
19 provided Whitfield with clear steps to effectuate proper service in their motions to dismiss  
20 and explained the alleged deficiencies in service to him. (ECF Nos. 7 at 16-18, 13 at 17-  
21 20.) Even given the leniency allotted to *pro se* litigants, the Court finds that Whitfield's  
22 reasons for delay or insufficiency of service are unpersuasive. As explained above,  
23 Whitfield has been given ample notice and allotted more than enough time to correct the  
24 deficiencies in service, but to date, has not.

25 In sum, because the prejudice to Defendants is significant, the length of delay  
26 substantial, with an adverse impact on the litigation proceedings, and Whitfield's  
27 reasonings for the delay unpersuasive, the Court finds that Whitfield failed to demonstrate  
28

excusable neglect.<sup>12</sup> See *Lemoge*, 587 F.2d at 1192. Since good cause requires a minimum showing of excusable neglect, the Court likewise finds that Whitfield has not demonstrated good cause and an extension of service is not warranted here. See *id.* at 1198 n.3; *Boudette*, 923 F.2d at 756. The Court must therefore dismiss the case without prejudice. See *U.S. v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.*, 366 F.3d 767, 772 (9th Cir. 2004) (citation omitted) (stating “[i]f the court declines to extend the time for service of process, the court shall dismiss the suit without prejudice”).

### C. Service by Publication

In his second motion for extension of service, Whitfield alternatively requests service by publication in the Reno Gazette Journal and the “Carson City Appeal” if the Court denied his motion. (ECF No. 39 at 3.) The Federal Rules of Civil Procedure generally allows for service in the manner prescribed by state law. See FRCP 4(e)(1); FRCP 4(j)(2). However, Whitfield failed to show that traditional service methods are impracticable and has not complied with the specific requirements and formalities that accompany a motion for service by publication in Nevada.<sup>13</sup> See NRCP 4.4(c). The Court therefore denies Whitfield’s request.

## V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and

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<sup>12</sup>Even if the Court found excusable neglect, dismissal would still be appropriate because Whitfield cannot show the additional three *Lemoge* factors that “bring the excuse to the level of good cause.” *Lemoge*, 587 F.3d at 1198 n.3. As explained above, the prejudice to Defendants is great, and there is significant doubt as to whether all Defendants received actual notice since service has been either insufficient or completely non-existent. While Whitfield will likely suffer some prejudice if this case is dismissed, he may refile his lawsuit since dismissal is without prejudice. Hence, even upon a finding of excusable neglect, the excuse would not rise to the level of good cause and dismissal is still proper. See *id.*

<sup>13</sup>The Court notes that Judge Cobb previously cautioned Whitfield “that seeking leave to serve by publication under Fed. R. Civ. P. 4(e)(1) and its counterpart Nevada Rules, i.e., Nev. R. Civ. P. 4(e)(1)(i) and (iii) require more than just making a motion for publication” and summarized some of the requirements for Whitfield. (ECF No. 37 at 3.)



1 determines that they do not warrant discussion as they do not affect the outcome of the  
2 motions before the Court.

3 It is therefore ordered that the Motion to Dismiss (ECF No. 13) the Amended  
4 Complaint (ECF No. 12) by Defendants Dzurenda, Nevada Department of Corrections,  
5 Nevada State Personnel, Nevada Department of Administration, and Ward is granted.

6 It is further ordered that the Motion to Dismiss (ECF No. 26) by Defendant Ranft is  
7 granted.

8 It is further ordered that Whitfield's Motion to Extend Time for Service (Second  
9 Request) (ECF No. 39) is denied.

10 It is further ordered that Defendants' Motion for Leave to File Supplemental Legal  
11 Authority (ECF No. 29) is denied as moot.

12 It is further ordered that Whitfield's Motion for Leave to File Supplemental Legal  
13 Authority (ECF No. 31) is denied as moot.

14 It is further ordered that this case is dismissed without prejudice.

15 The Clerk of Court is directed to enter judgment accordingly and close this case.

16 DATED THIS 18<sup>th</sup> Day of January 2022.

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20 MIRANDA M. DU  
21 CHIEF UNITED STATES DISTRICT JUDGE  
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